

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF FRESNO,

Plaintiff and Respondent,

v.

PINEDALE COUNTY WATER DISTRICT,

Defendant and Appellant.

F080769

(Super. Ct. No. 18C-0051)

**ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]**

It is hereby ordered that the nonpublished opinion filed herein on June 10, 2022, be modified as follows:

1. At the end of the first sentence in the first full paragraph on page 31, after the sentence ending “in Civil Code section 1691,” add as footnote 10 the following footnote:

¹⁰ While the District also asserts the trial court erred in sustaining the City’s demurrer and denying the District’s motion to consolidate the Fresno lawsuit with the Kings County action, it does not present any meaningful legal analysis to support its claims of error or raise these issues under separate headings or subheadings, and therefore has forfeited those claims. (*Kinsella v. Kinsella* (2020) 45 Cal.App.5th 442, 464 [an appellant who fails to present argument or legal authority “forfeits appellate consideration of the issue”]; Cal. Rules of Court, rule 8.204(a)(1)(B) [each point in a brief must be stated “under a separate heading or subheading” and supported “by argument and, if possible, by citation of authority”].)

2. At the end of the second sentence in the first full paragraph on page 33, after the sentence ending “depends on extrinsic evidence,” add as footnote 11 the following footnote:

¹¹ In a petition for rehearing, the District cites Government Code section 68081, contending we should grant rehearing because it was not given an opportunity to brief whether extrinsic evidence is required to determine the Agreement’s validity. We disagree, as the issue of whether its rescission claim was a collateral attack on the second amended judgment was briefed by the parties. Government Code section 68081 does not give the parties a right to submit supplemental briefs when an appellate court relies upon authority the parties did not brief: “The parties need only have been given an opportunity to brief *the issue decided by the court*, and the fact that a party does not address an issue, mode of analysis, *or authority* that is raised or fairly included within the issues raised does not implicate the protections of section 68081.” (*People v. Alice* (2007) 41 Cal.4th 668, 679, italics added.)

3. At the end of the second full paragraph on page 40, after the sentence ending “authorized by the parties’ Agreement,” add as footnote 12 the following footnote:

¹² In its petition for rehearing, the District contends we should grant rehearing because it was not given an opportunity to brief whether attorney fees were recoverable under Code of Civil Procedure section 1021. The issue of the validity of the trial court’s attorney fee award, however, was raised in the parties’ briefs. As we have explained, Government Code section 68081 does not give the parties the right to submit supplemental briefs when an appellate court relies on authority the parties did not brief. (*People v. Alice, supra*, 41 Cal.4th at p. 679.)

Except for the modifications set forth above, the opinion previously filed remains unchanged. This modification does not effect a change in the judgment.

Appellant’s petition for rehearing filed on June 24, 2022, is denied.

DE SANTOS, J.

WE CONCUR:

DETJEN, ACTING P. J.

FRANSON, J.

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Defendant and Appellant.

F080769

(Super. Ct. No. 18C-0051)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Kathy Ciuffini, Judge.

Costanzo & Associates and Neal E. Costanzo, for Defendant and Appellant.

Betts & Rubin and James B. Betts for Plaintiff and Respondent.

-ooOoo-

Appellant Pinedale County Water District (District) and respondent City of Fresno (City) are parties to a contract that requires the City to receive, transport, treat and dispose of the District's sewage, and the District to bill and collect sewer charges from its customers at rates set forth by City ordinances and regulations and remit payment to the City as specified in the contract. Beginning in December 2007, the City informed the

District it wanted to conduct an audit of the District's fiscal records pursuant to an audit provision in the contract. The District refused to submit to an audit, contending the provision only required it to produce certain documents for the City to examine. After a six-month exchange of letters between the attorneys for both entities, the City filed suit against the District to compel the audit. After a bench trial held in 2011, the trial court found in the City's favor and issued a judgment against the District that allowed the City to conduct the audit and awarded the City contractual attorney fees.

Despite our affirming the judgment and the award of attorney fees on the District's appeal in 2013, the District continued to believe the audit was unjustified and the amount of attorney fees awarded unfair. The District declined to pay the judgment and instead attempted to negotiate a settlement with the City. The parties, however, did not settle and the City, who had not exercised its right to conduct the audit, brought this action for petition for writ of mandate to compel the District to pay the judgment as provided in Government Code section 970.2. In an attempt to nullify the judgment, the District filed a cross-complaint to rescind the parties' contract based on illegality, which it incorporated as an affirmative defense in its answer, and asserted numerous defenses to the petition.

Following a bench trial, the trial court rejected the District's rescission claim and its other defenses and granted the City's petition for writ of mandate. The trial court issued a judgment ordering the District to pay the amount awarded in the judgment from the underlying action plus interest and the City to recover its attorney fees and costs as the prevailing party, which it awarded in a subsequent order and added to the judgment.

The District appeals, contending (1) the City forfeited its ability to recover the judgment in the underlying action under the security first rule of Code of Civil Procedure section 726; (2) it does not have a duty to pay the judgment in the underlying action because all of its funds are restricted; (3) the judgment is void because the petition for writ of mandate was filed without the city council's authorization; (4) the judgment in the

underlying action cannot be enforced because it is void as it is based on an illegal contract; (5) the trial court abused its discretion when it declined to bar the City from recovering under the unclean hands doctrine; and (6) there is no legal basis for an award of attorney fees. As we explain, we disagree with the District's contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The 1976 Contract and 2007 Agreement

The City owns and operates treatment works used to transport and treat wastewater and sewage. Between 1974 and 1977, the City expanded the treatment works by constructing a West Fresno-Herndon Interceptor and enlarging its regional wastewater treatment facilities (RWTF).

In the 1970's, the California Regional Water Quality Control Board mandated the District, which had been treating and disposing of sewage in its service area through its own facilities, to solve treatment problems the District was experiencing. In 1976, the District and the City entered into a written contract for the City to transport and treat District sewage after the District determined disposal of its sewage through the City's interceptor and RWTF was a more fiscally sound solution than upgrading its existing treatment facilities. Under the 1976 contract, the District would continue to charge and invoice its customers at specified rates, and pay a portion of the charges collected to the City to compensate for its use of the RWTF. After the 1976 contract was executed, the District was connected to the City's treatment works via the interceptor, and the City received, transported, treated and disposed of all District sewage pursuant to the terms of the 1976 contract.

In the 1990's, the City constructed capital improvements to the RWTF to restore and expand its capacity, the cost of which was incorporated into the sewer service charge. Thereafter, a dispute arose between the City and the District regarding the amounts the

District was required to collect and remit to the City under the 1976 contract, which resulted in the City filing a lawsuit against the District in 2005.

The parties entered into an agreement, effective January 1, 2007, which settled the 2005 lawsuit (the Agreement). The Agreement rescinded the 1976 contract and set forth new terms and conditions for the transportation and treatment of District sewage. The Agreement required the District to bill and collect sewer charges from its customers at rates set forth by City ordinances and regulations, and remit payment to the City as specified in the Agreement.

Paragraph 19 of the Agreement, entitled “Maintenance of Records and Audit,” requires the District to “maintain all records pertaining to their sewage collection system and obligations under this Agreement including, without limitation, the identification of all District customers and respective premises, and all charges and receipts for sewer service.” Paragraph 19 further provides that “all books, documents, papers, and records of District pertaining thereto shall be available to City for the purpose of making audits, examinations, excerpts, and transcriptions,” and states the “District agrees to make available to City a copy of all independent audits and to allow City to conduct audits of the fiscal records of District pertaining to this Agreement as City may determine necessary.” Paragraph 19 specifically provides that it “shall survive expiration or termination of this Agreement.”

The Agreement contains an attorney fees provision that allows the prevailing party in an action “to enforce or interpret any term, covenant or condition” of the Agreement to recover reasonable attorney fees and legal expenses from the other party.

The Audit Lawsuit

Beginning in December 2007, the City informed the District it wanted to conduct an audit of the District’s fiscal records pursuant to paragraph 19, but the District refused to submit to an audit, contending the entirety of paragraph 19 only required it to produce certain documents to the City, which the City could then examine. After an exchange of

letters between the attorneys for both entities over a six-month period, the City filed suit against the District in Fresno County Superior Court, asserting claims for breach of contract, declaratory relief, and accounting, seeking both specific performance and an injunction. The lawsuit subsequently was transferred to Madera County Superior Court.

After a bench trial based solely on documentary evidence, declarations and deposition testimony, the trial court issued a statement of decision in which it found in the City's favor on all its claims. The trial court granted the City's requests for specific performance of the Agreement, injunctive relief, and an accounting "to the extent that such remedies are congruent with an audit of District's internal financial controls and operations involved in fulfilling its obligations under the 2007 Agreement."

In October 2011, the trial court issued a judgment in the City's favor which ordered that the City "shall be allowed to conduct an investigation and audit of the District's internal financial controls and operations including, but not limited to, all records pertaining to the sewage collection system and the District's obligations under the Agreement, in order to determine whether the [] District is fulfilling its obligations under the 2007 Agreement." The judgment provided that the City could recover its costs, including attorney fees, as permitted by statute or contract via a timely filed memorandum of costs. The trial court retained jurisdiction to address and resolve any issues relating to costs or arising between the parties following issuance of the judgment which relate to the enforcement of the terms of the judgment and statement of decision.

In January 2012, the trial court issued an amended judgment which added a total of \$86,658.53 in attorney fees and costs awarded to the City to the original judgment.

The District appealed the original judgment and the award of costs and attorney fees, both of which we affirmed in *City of Fresno v. Pinedale County Water District* (Sept. 17, 2013, F064112) and *City of Fresno v. Pinedale County Water District* (Sept. 17, 2013, F064758), respectively. In both appeals, we awarded costs to the City.

In December 2013, the City filed a memorandum of costs on appeal totaling \$938.91; no motion to tax costs was filed. The next month, the trial court granted the City's motion for attorney fees on appeal and awarded the City additional legal fees of \$39,918 as part of the judgment.

The City's Collection Efforts

On February 11, 2014, one of the City's attorneys, Joseph Rubin, sent a letter to the District's counsel, Neal Costanzo, recounting the three orders for attorney fees and costs, which remained unpaid. Rubin stated the attorney fees and costs the District owed the City totaled \$127,515.44 and asked Costanzo to have the District submit payment to the City by February 14, or reach a mutually agreeable payment arrangement within 10 days, "otherwise, the City will proceed with collection proceedings."

On February 14, 2014, Costanzo responded by letter that the District would not pay the judgment that day and while the City threatened "unspecified 'collection proceedings,' " that was "not going to occur." Costanzo explained as a county water district and local public entity, the District had until the end of the fiscal year to budget for payment of the judgment and if funds were not available, it had until the end of the following fiscal year to do so. Costanzo added the District's ability to pay a judgment was restricted by the Constitution and various provisions of the Government Code, and the District would address the judgment in conformity with the applicable law.

Another of the City's attorneys, James Betts, responded in a February 21, 2014 letter that "[a]s a professional courtesy, we take this opportunity to confirm that in the absence of any proposal from your client to pay some or all of its outstanding judgment, we will proceed with normal collection proceedings."

On April 17, 2014, Costanzo received a call from the Madera County Superior Court clerk stating the City was applying for a writ of execution on the judgments entered against the District. The next day, Costanzo wrote Betts and Rubin a letter stating that a writ of execution can neither be obtained against a public entity nor executed on and the

sole remedy to compel a local public entity such as the District to satisfy a monetary judgment is to file a petition for writ of mandate. Costanzo stated that unless he was apprised that a writ of execution had not been applied for or issued, or that if one was issued it would be recalled or rescinded, he would move ex parte to have the writ recalled. Betts responded in an April 21, 2014 letter that they would “pursue and file Abstracts of Judgment, but we will not seek collection by way of a Writ of Execution,” and the City would “pursue all available legal options to collect[] the \$127,515.44, plus interest” the District owed.

The City recorded abstracts of judgment in Fresno County on May 13, 2014, and in Madera County on June 2, 2014. According to Costanzo, he sent Betts a letter on January 7, 2015, demanding that he immediately record releases of the abstracts because they were filed in violation of the law. Betts responded by letter that while he disagreed with Costanzo’s analysis, he would do so. The City recorded releases in Madera County on January 20, 2015, and in Fresno County on January 26, 2015.

Meanwhile, Betts sent a letter to the Madera County Superior Court on January 15, 2015, asking the court to execute a second amended judgment. Costanzo sent a letter to the superior court objecting to the request, asserting the court did not have jurisdiction to grant the request because the original judgment was final. Apparently, the trial court did not enter the second amended judgment.

The City then filed a motion to include the trial court’s postjudgment award of appellate attorney fees and costs in the judgment by issuing either an amended judgment or a judgment awarding costs on appeal. The District opposed the motion, again arguing the court did not have jurisdiction to issue an amended judgment. The trial court issued the second amended judgment on April 6, 2015, which states the amended judgment in the amount of \$86,658.53, should be amended to include the costs and attorney fees the City incurred on appeal, and the City “shall recover the sum of \$127,515.84” against the District.

Meetings Between the District and City Concerning the Amount Owed

According to David Rodriguez, the president of the District's board of directors, he contacted Steve Brandau, the City councilmember who represented the area where the District is located, concerning the judgment in April 2015. Rodriguez testified he told Brandau the auditor wanted to download all the files on the District's computer, which Rodriguez believed was "totally insane." Brandau agreed that was improper. Brandau did not know anything about the attempted audit or the lawsuit. Brandau called the City's public utilities director, Thomas Esqueda, who also did not know anything about the audit or lawsuit.

However, Brandau, who did not become a member of the city council until 2012, testified he was not aware of the judgment until a month or so before July 11, 2017, when he attended a District board meeting. His best recollection was that Rodriguez told him there was a disagreement between the City and District concerning the amount that should be paid on the judgment, and Rodriguez told him the District felt it was being overcharged and the amount was unfair. While he did not remember the details of the conversation, he recalled Rodriguez asked him to attend the board meeting, where he figured he would learn more. Brandau recalled asking Esqueda about what was happening. Esqueda told him there was a disagreement over the amount owed and a conflict over whether the District wanted to pay that amount.

Rodriguez and the District's general manager, Jason Franklin, both testified about a meeting they said they attended with Esqueda and City Manager Bruce Rudd in April or May 2015. Rudd, who was not aware of the attempted audit or litigation, asked what the money judgment was for. Franklin and Rodriguez explained the City sent an auditor who wanted to download everything on the District's computers, but the District refused, and the judgment was for attorney fees awarded in a suit the City brought to compel the

audit.¹ Esqueda and Rudd responded it did not sound like something the City would do, namely, try to take everything from the District's hard drive, and they did not know why the City attempted to conduct the audit. Rodriguez claimed Rudd agreed the audit, as Rodriguez described it, would be improper. Rodriguez pointed out the City had a court order allowing them to conduct the audit and asked if the City was going to do so. Esqueda and Rudd told them the City would not conduct the audit, as they did not see any basis for it. According to Franklin, Esqueda and Rudd did not indicate what they were going to do about the judgment, but he and Rodriguez left the meeting feeling they might be able to work something out.

Esqueda, who began working at the City as the director of public utilities in June 2014, remembered being present at a meeting with Rudd, Franklin and Rodriguez, but he did not recall what was discussed and he did not recall talking about the litigation. He felt the meeting was an introductory one because he had not previously met Franklin or Rodriguez.

In October 2015, Esqueda drafted a letter to the District proposing that it pay the \$127,515.84 judgment in equal payments over 10 years with no interest, but rather than mail the letter, he emailed the draft to Franklin to let Franklin know what he was thinking. Around that time, Esqueda attended a District board meeting to discuss the judgment and the City's proposal for its payment over 10 years. Esqueda remembered some board members commenting about the audit and that they did not view the City's approach to exercising the audit provision favorably. After he presented the City's proposal, the board went into closed session.

The next month, Esqueda met with Franklin and Costanzo. Esqueda recalled Costanzo telling him the judgment rendered based on the attorney's work did not seem

¹ Rodriguez admitted he never read the trial court's decision. While Rodriguez did not believe the City's audit request was made in good faith, he did not know the District stipulated that the request was made in good faith during trial in the audit lawsuit.

appropriate and the amount was not reasonable, and Costanzo thought \$30,000 to \$40,000 was an appropriate level of compensation the City would have paid its attorney. Esqueda did not recall hearing anything about the 2007 contract needing to be changed or modified. Esqueda never saw the discussion as an offer, it was more a statement of the range the District thought would be more appropriate for attorney fees and costs.

Franklin, however, testified Esqueda was told the contract was illegal and would be rescinded. Franklin further testified the District offered to pay 25 percent of the judgment, but if the City made a counterproposal of \$40,000, it would seriously consider paying that amount. Franklin acknowledged the District did not make a written settlement offer to the City and they did not discuss when a payment would be made or whether it would be made in a lump sum or installments. The District had \$40,000 in general funds available to make a lump sum payment. Franklin did not discuss whether the settlement, if it was accepted, would be a written or oral agreement, but he assumed it would be a written formal agreement.

Esqueda sent an email to Franklin on March 23, 2016, stating the settlement had “gotten away from [him],” but he recalled he was going to come back with a counter to Franklin’s counteroffer. Esqueda stated the City’s original proposal was for the District to pay the judgment over 10 years with no interest, and he believed the District’s board wanted a “counter with a proposal of \$40k or something along those lines.” Esqueda apologized for forgetting Franklin’s counter and asked him to resend it as he needed to work on “this item.” Esqueda testified he needed a written settlement offer so he could “run it up the flagpole,” but he did not remember receiving one or receiving a response from Franklin. Esqueda had discussions with the city attorney, who was responsible for placing items on the agenda for closed sessions, about the situation between the City and the District. Esqueda, however, never presented a formal offer to anyone because the District never made a formal offer.

Franklin testified he sent an email to Esqueda on March 25, 2016, in which he stated that when he and the District's legal counsel last discussed the matter with Esqueda, the District's offer was to pay 25 percent of the judgment, which equals \$31,250; the District's position was that the \$125,000 claimed was overstated since it incurred around \$40,000 in costs for its legal counsel; and the board "has indicated they would seriously consider paying 40k if that was the City's counter proposal." Franklin did not receive a response to this email from Esqueda or anyone else at the City.

Esqueda contacted Franklin in June 2017 and asked to attend the next District board meeting to discuss the legal fees owed the City and the potential need for an audit, among other things. Esqueda and Brandau attended the July 11, 2017 District board meeting. According to Brandau, about a month before the board meeting an offer from the District was presented to the city council for approval, which the council rejected in closed session.

At the July 2017 board meeting, Esqueda informed the board members that due to the parties' inability to agree on how the judgment was to be paid, the city attorney told him the "issue w[ould] go to court and a writ of mandate was issued in June of 2017." Brandau believed a discussion took place at the board meeting about the District wanting to pay substantially less than the judgment, maybe a third of the judgment, and the District felt \$40,000 was a fair price. Brandau did not see this as an offer but rather more like what the District felt was fair. Esqueda, however, held firm that the amount of the judgment was the "right price."

The Petition for Writ of Mandate

On June 16, 2017, the City filed a petition for writ of mandate pursuant to Government Code section 970.2 in Fresno County Superior Court. The City sought to compel the District to pay the amended judgment of \$86,658.53, the costs on appeal of \$938.91, and the attorney fees on appeal of \$39,918, as ordered by the court on January 31, 2014. The City alleged it demanded payment of these amounts on February

11, 2014, but the District failed and refused to pay. The City asked the trial court to issue a peremptory writ of mandate compelling the District to pay the judgment with interest, an award of attorney fees incurred in prosecuting the writ as provided in the Agreement, and costs of suit.

After the action was transferred to Kings County Superior Court, the District answered and filed a cross-complaint for rescission of the Agreement on the ground the agreement “is illegal, invalid and void” as the District has no authority to contract away its statutory and constitutional authority to set rates for sewer service, and is legally precluded from delegating its power and obligation to set sewer rates. The cross-complaint also contained a declaratory relief claim, in which the District sought a declaration that the City’s recording of the release of abstracts of judgment released and discharged the District from any obligation under the judgment the City sought to enforce in the petition. In the second affirmative defense alleged in the answer, the District incorporated the cross-complaint’s allegations.

The City demurred to the cross-complaint, which the District opposed. As pertinent here, the City asserted the court did not have jurisdiction over the cross-complaint as the City’s petition for writ of mandate is a special proceeding to compel the District to pay an outstanding judgment and to the extent the District had any independent causes of action it wished to assert against the City, it did not have authority to assert them through a cross-complaint to the petition. The trial court issued a tentative decision sustaining the demurrer without leave to amend on the ground the District failed to cite persuasive authority that it may file a cross-complaint to a petition for writ of mandate filed in accordance with Government Code sections 970.2 and 970.4, and it declined to exercise any discretion it had to entertain a cross-complaint. Following arguments at a July 23, 2018 hearing on the demurrer, the trial court stated it would adopt the tentative ruling. A written order sustaining the demurrer without leave to amend was filed on October 22, 2018, which incorporated the tentative ruling.

On August 9, 2018, the District filed a complaint for rescission of the Agreement in Fresno County Superior Court, which replicated the cross-complaint (the Fresno lawsuit). The next month, the District filed a motion in the Kings County action to transfer the Fresno lawsuit there, consolidate it with the proceeding on the City's petition for writ of mandate, and stay the proceeding pending the transfer and consolidation. The City opposed the motion.

Following a hearing on October 4, 2018, the Kings County court issued an order denying the motion, finding that by filing a complaint in Fresno County alleging the same causes of action as the stricken cross-complaint, and seeking to transfer, consolidate, and stay the Kings County proceeding, was an improper and unsupported attempt to seek reconsideration of the ruling on the demurrer. The court further found the District did not cite any new facts or law to support consolidation of the complaint, as required for reconsideration under Code of Civil Procedure section 1008, and there was nothing to suggest the decision on the demurrer would have been different if a complaint was before the court rather than a cross-complaint.

Trial on the City's petition for writ of mandate was set for May 28, 2019. In March 2019, the District filed a motion to stay, vacate or continue the trial date. The District attached an order from the Fresno County court transferring the Fresno lawsuit to Kings County and asserted that while the transfer had not yet occurred, it was imminent. The District asserted the rescission complaint was dispositive of the City's petition and would render the matter moot. The City opposed the motion, arguing the District did not have authority to assert an independent claim in connection with the City's petition and the District cannot collaterally attack the City's judgment.

At the conclusion of the April 25, 2019 hearing on the motion, the trial court stated it would adopt its tentative ruling to deny the motion. The trial court subsequently issued a written order denying the motion on the grounds set forth in its tentative ruling. The trial court noted that while the Fresno lawsuit had allegedly been ordered transferred

to Kings County, it had not yet been filed. The trial court found the Fresno lawsuit was a collateral attack on a lawful judgment since the invalidity of the judgment, as asserted by the District, did not appear on its face. Therefore, the District was required to seek relief from the judgment under Code of Civil Procedure section 473, subdivision (b), which it failed to do, and the presence of the Fresno lawsuit did not support a delay in collection of the judgment.

The Trial on the Petition

The case proceeded to a three-day court trial. The parties submitted trial briefs and requests for judicial notice, as well as motions in limine. The trial court took judicial notice of exhibits the parties submitted. Pursuant to the parties' stipulation, the trial court took the deposition transcripts of Brandau and Esqueda into evidence, and Rodriguez and Franklin testified at the trial. The parties submitted posttrial briefs.

The trial court issued a proposed statement of decision on October 9, 2019, granting the petition for writ of mandate. The trial court found the City established the existence of a \$127,515 judgment, the demand for payment of the judgment, and the District's failure to pay any part of the judgment. The trial court rejected the following affirmative defenses: (1) the one form of action rule; (2) illegal contract, void judgment, and rescission; (3) unclean hands; (4) estoppel; and (5) futility. The trial court stated the City had calculated interest on the judgment as of June 1, 2019, as \$18,080, which accrues at \$7.41 per day. The trial court found the City, as the prevailing party, was entitled to attorney fees and costs, which were to be determined following a timely filed cost bill.

The District filed objections to the proposed statement of decision on October 31, 2019, to which the City filed a response. Meanwhile, the City filed a memorandum of costs and a motion for attorney fees on October 22, 2019. The District filed a motion to strike the memorandum of costs and an opposition to the attorney fees motion.

A hearing was held on the District's objections to the proposed statement of decision on December 9, 2019. After hearing argument from the District's counsel, the trial court overruled the District's objections and adopted the proposed statement of decision as the final statement. The trial court executed a judgment, which states the petition for writ of mandate is granted, the District is ordered to pay the \$127,515.84 awarded in the second amended judgment entered in the audit lawsuit, plus accrued interest of \$18,080 as of May 31, 2019, and interest accruing thereafter at \$7.41 per day. The judgment further states the City, as the prevailing party, shall recover its attorney fees and costs as permitted by statute or contract, as determined pursuant to a timely filed memorandum of costs, and the court shall retain jurisdiction to resolve disputes relating to the City's recovery of costs or issues which arise between the parties relating to enforcement of the judgment. The statement of decision and second amended judgment filed in the audit lawsuit are attached to the judgment. The trial court set a hearing on the motion for attorney fees and costs for January 15, 2020.

After hearing argument at the January 15, 2020 hearing, the trial court announced it was granting the City's motion. The trial court found the City was the prevailing party, it was entitled to its costs, and due to the enforcement of a judgment that included an attorney fee award, the City was entitled to \$92,201 in attorney fees incurred in pursuing this collection action. The trial court denied the District's motion to strike costs.

The District filed a notice of intention to move for a new trial or to vacate the judgment, followed by a memorandum of points and authorities in support of the motion. The trial court denied the motion without a hearing, stating in a written order that it did not find any legal or procedural grounds to support a modification of the statement of decision or a need to reopen the case for further proceedings.

Over the District's objection, the trial court entered an amended judgment on January 29, 2020, which states the court entered its judgment on December 9, 2019, which was attached; it subsequently fixed the City's recoverable attorney fees at \$91,879,

together with untaxed costs of \$322, for a total award of fees and costs of \$92,201; and the judgment was ordered amended to include the City's recovery of fees and costs of \$92,201 against the District. An order awarding the attorney fees and costs referred to in the amended judgment was entered on January 30, 2020.

The District filed a notice of appeal from the December 2019 judgment, the January 2020 amended judgment, the order granting an award of attorney fees, and the order denying the new trial motion.

DISCUSSION

Standard of Review

A money judgment against a local public entity is not enforceable by execution. (Code Civ. Proc., § 695.050; Gov. Code, § 970.1, subd. (b).) Rather, the appropriate remedy to compel payment by a local public entity is a writ of mandate. (Gov. Code, § 970.2; *Joseph v. San Francisco Housing Authority* (2005) 127 Cal.App.4th 78, 81 (*Joseph*).) “Mandamus [serves] to compel the performance of a clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that duty.” (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1265.) In reviewing the trial court's ruling on the writ of mandate petition, we defer to its express and implied factual determinations if supported by substantial evidence and review de novo the interpretation and application of statutes, regulations, and rules. (*Joseph*, at p. 81; *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 461–462.)

The One Form of Action Rule

At trial, the District argued the City's recording of the abstracts of judgment and their subsequent release discharged the judgment debt secured by the abstracts under Code of Civil Procedure section 726. The District asserted the abstracts are the equivalent of a mortgage and by releasing the abstracts without the District's consent, the City waived its right to enforce the underlying judgment.

The trial court rejected the District's argument, explaining in its statement of decision that the District failed to produce persuasive authority the City's filing and subsequent release of the abstracts of judgment prior to filing the petition for writ of mandate was the equivalent of initiating an action on a mortgage, thereby invoking the one form of action rule of Code of Civil Procedure section 726. The trial court found the District's cases were distinguishable and did not support the District's assertion that the filing and release of the abstracts of judgment waived the debt.

The District renews its argument on appeal. The District asserts that because an abstract of judgment and a mortgage both create liens against real property, abstracts of judgment are subject to the one form of action rule of Code of Civil Procedure section 726. The District argues that by releasing the abstracts of judgment the City forfeited its right to sue on the judgment. The District contends its argument is based on a purely legal question, namely, whether the abstracts qualify as a mortgage, which is subject to our independent review, and contends the "abstracts are a mortgage."²

Code of Civil Procedure section 726, subdivision (a) provides, in pertinent part: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property" "Section 726, which sets forth the so-called 'one form of action' rule, is part of the statutory protections and procedures which restrict the secured creditor's remedies for notes secured by real property. As judicially construed, section 726 is both a 'security first' and 'one-action' rule: It compels the secured creditor, in a single action, to exhaust his security judicially *before*

² The District asserts the trial court did not set out the factual or legal basis for its decision on this issue in the statement of decision and that constitutes per se reversible error, citing *Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1129–1130. But as the District asserts, the resolution of whether an abstract qualifies as a mortgage is a legal issue, and therefore we are unconcerned with any purported inadequacy in the statement of decision. (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1291–1292 [a statement of decision is required only as to issue of fact, not issues of law].)

he may obtain a monetary ‘deficiency’ judgment against the debtor.” (*O’Neil v. General Security Corp.* (1992) 4 Cal.App.4th 587, 597; see *Coker v. JPMorgan Chase Bank, N.A.* (2016) 62 Cal.4th 667, 690–691.)

A debtor may invoke Code of Civil Procedure section 726, subdivision (a)’s protection “by either (1) raising it as an affirmative defense, compelling the creditor to first exhaust the security before being entitled to a monetary judgment on any deficiency, or (2) invoking it as a sanction, meaning that a creditor who obtains a monetary judgment rather than foreclosing on the security will be deemed to have waived the right to pursue the security interest.” (*In re Prestige Ltd. Partnership-Concord* (9th Cir. 2000) 234 F.3d 1108, 1114–1115, citing *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 997.)

The District contends that by releasing the abstracts the City forfeited its right to sue on the judgment, citing cases that have held a creditor may not unilaterally divest its security interest without the debtor’s consent to bring an action on the note. (See, e.g., *Hibernia Savings & Loan Society v. Thornton* (1895) 109 Cal. 427, 429 [the mortgagee “will not be permitted without the consent of the mortgagor to release the mortgage for the purpose of bringing an action upon the note”]; *Pacific Valley Bank v. Schwenke* (1987) 189 Cal.App.3d 134, 137–138, 140 [a creditor may not circumvent Code Civ. Proc., § 726 “by divesting himself of his security without the consent of the debtor”; if he does “he has waived his right to proceed on the note”].)

As the District recognizes, its argument hinges on whether an abstract of judgment is a mortgage since Code of Civil Procedure section 726 applies only to the “recovery of any debt or the enforcement of any right secured by *mortgage* upon real property.” (Code Civ. Proc., § 726, subd. (a), *italics added*.) The District, which states it was not “able to cite a single case involving an abstract of judgment and application of the security first rule because no such case exists,” asserts it is, since an abstract of judgment and a mortgage both create liens. But Code of Civil Procedure section 726 does not

apply to all liens; it has been held not to apply to a vendor's lien (*Jones v. Evans* (1907) 6 Cal.App. 88, 92), a judgment lien³ (*Lisenbee v. Lisenbee* (1919) 42 Cal.App. 567, 569-570 (*Lisenbee*)), or a mechanic's lien (*Martin v. Becker* (1915) 169 Cal. 301, 307), as in each situation the creditor was not required to first exhaust the security.

With respect to judgment liens, the appellate court explained in *Lisenbee* the lien's effect is to preserve the judgment's efficacy and become a remedy in aid of its execution, rendering the judgment capable of enforcement. (*Lisenbee, supra*, 42 Cal.App. at p. 569.) But it would "amount to a procedural circumvolution wholly unnecessary and antagonistic to the genius of the reformed procedure if the law contemplated and it was necessary to hold that, to secure the benefit of the lien ... a proceeding to foreclose such lien was required." (*Id.* at p. 570.) Thus, satisfaction of a judgment may "be secured by the usual method of executing judgments or without resorting to a proceeding to foreclose the lien." (*Ibid.*)

The District does not convince us that we should depart from the holding in *Lisenbee*. While the District asserts it cited numerous cases that "apply the statutory definition of a mortgage to any encumbrance created to pay a debt and not a conveyance in trust," none of those cases concern a judgment lien. (See *Jackson v. Lacy* (1940) 37 Cal.App.2d 551, 558-559 ["[a] mortgage is merely an incumbrance created to pay a debt and not a conveyance in trust"]; *Banta v. Wise* (1901) 135 Cal. 277, 279-280 [deed purporting to convey specific land given to secure indebtedness was a mortgage]; *Edwards-Town, Inc. v. Dimin* (1970) 9 Cal.App.3d 87, 92 [a vendor's lien arises with the

³ "A judgment lien on real property is created by recording an abstract of a money judgment with the county recorder. (Code Civ. Proc., § 697.310, subd. (a).) Upon recording, the lien automatically attaches to all real property the judgment debtor owns within that county. (*Id.*, § 697.340, subd. (a).) The effect of the lien is to secure the debt: it allows the judgment to be satisfied from the proceeds of a sale of the property. [Citation.] The lien remains until the judgment creditor files an acknowledgement of satisfaction of judgment or agrees to release the lien." (*Longview Internat., Inc. v. Stirling* (2019) 35 Cal.App.5th 985, 988-989.)

sale and transfer of legal title if full consideration is not paid and the vendor has not taken other security; the vendor may waive his lien if he manifests an intent not to rely on it].)

Since Code of Civil Procedure section 726 does not apply to an abstract of judgment, the City was within its rights to bring a petition for writ of mandate under Government Code section 970.2 to enforce its judgment.

Restricted Funds

The District argued at trial the revenues it receives for providing sewer, water, and waste collection could not be used to pay the judgment because they were restricted funds. In its statement of decision, the trial court stated it agreed with the City that an argument that it would be futile to order a public entity to pay a judgment was rejected as a defense to payment in *Joseph, supra*, 127 Cal.App.4th at page 82. The trial court found the District's position was contradicted by the District's settlement offer and documents which showed the District had cash assets. Moreover, sewer fees may be used to pay for the sewer system's maintenance and management, as stated in *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 369 (*Moore*); therefore, the litigation expenses relating to an audit of the collection of sewer fees may be paid as part of the sewage systems' operating costs.

Government Code section 970.2 provides local public entities such as the District "shall pay any judgment in the manner provided in this article." A local public entity is required to pay the full amount of any judgment, with interest, out of any unrestricted funds that are available for the fiscal year in which the judgment was entered, and if any amount remains unpaid, to obtain funds and pay that amount the following fiscal year.

(*Joseph, supra*, 127 Cal.App.4th at p. 82; Gov. Code, §§ 970.4,⁴ 970.5.⁵)⁶ In furtherance of these provisions, Government Code section 970.8 mandates that the budgets of local public entities for each fiscal year must include “a provision to provide funds in an amount sufficient to pay all judgments in accordance with this article.” (Gov. Code, § 970.8, subd. (a).)

In *Joseph*, surviving family members of five people killed when a fire broke out at a housing development owned and operated by the San Francisco Housing Authority (SFHA) obtained a \$12 million judgment against SFHA, which a jury found liable for the deaths. (*Joseph, supra*, 127 Cal.App.4th at p. 80.) SFHA did not pay the plaintiffs, so they petitioned to compel SFHA to satisfy the judgment. SFHA opposed the writ petition, claiming it did not have the funds to satisfy the judgment and did not have the legal obligation or power to raise the funds. (*Ibid.*) The trial court granted the petition and issued an order requiring SFHA to, among other things, pay the judgment if funds

⁴ Government Code section 970.4 provides: “Except as provided in Section 970.6, the governing body of a local public entity shall pay, to the extent funds are available in the fiscal year in which it becomes final, any judgment, with interest thereon, out of any funds to the credit of the local public entity that are: [¶] (a) Unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes; or [¶] (b) Appropriated for the current fiscal year for the payment of judgments and not previously encumbered.”

⁵ Government Code section 970.5 provides: “Except as provided in Section 970.6, if a local public entity does not pay a judgment, with interest thereon, during the fiscal year in which it becomes final, the governing body shall pay the judgment, with interest thereon, during the ensuing fiscal year immediately upon the obtaining of sufficient funds for that purpose.”

⁶ Pursuant to Government Code section 970.6, an entity can pay a judgment in 10 equal annual installments if (1) its governing body adopts an ordinance or resolution with findings that an unreasonable hardship will result unless installment payments are allowed; and (2) the court, following a hearing, finds that payment of the judgment in installments is necessary to avoid an unreasonable hardship. (Gov. Code, § 970.6, subd. (a)(1), (2).)

were available and, if not, to take proper steps to appropriate the amount required to meet that obligation. (*Id.* at pp. 80–81.)

SFHA appealed, claiming it demonstrated no funds were available to satisfy the judgment and it would be unable to obtain the funds. (*Joseph, supra*, 127 Cal.App.4th at p. 81.) The appellate court found the trial court’s order followed the procedure set forth in the Government Code, explaining while “SFHA may or may not have funds available at the present time ... that means only it has an excuse for not paying the full amount of the judgment during the current fiscal year.” (*Id.* at p. 82.) SFHA argued it was prohibited from using the property and funds it received from the federal government and the tenants who paid discounted rents funded by the federal government, as its use of the funds was restricted by law. (*Ibid.*) The appellate court, however, found that nothing prohibited SFHA from using the federal funds or properties, or the rents obtained from the properties, to pay the judgment, its funding sources were not limited to the federal government, and SFHA had the independent power to raise revenues by issuing bonds and making or selling a mortgage loan. (*Id.* at pp. 85–86.) Accordingly, the appellate court found a writ of mandate was properly issued to compel SFHA to pay the judgment entered against it and SFHA had not shown its issuance was a futile act. (*Id.* at p. 87.)

Like the public entity in *Joseph*, the District argues it demonstrated at trial that no funds were available to satisfy the judgment. The District, however, contends that rather than operating as a defense, i.e., that issuing the writ would be futile, its inability to pay shows the City cannot prove one of the elements essential to issuance of a writ of mandate, i.e., that the District has a clear, present, and usually ministerial, duty to pay. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539–540 [to obtain writ relief a petitioner must show (1) the respondent’s “ ‘clear, present and usually ministerial duty[,]’ ” and (2) the petitioner’s “ ‘clear, present and beneficial right ... to the performance of that duty’ ”]; 8 Witkin, Cal. Procedure (6th ed. 2022) Extraordinary

Writs, § 74 “[i]n the absence of a showing of this correlative duty and right, the writ will be denied”].)

The District asserts the parameters of its duty to pay is found in Government Code section 970.4, which requires it to pay the judgment out of funds that are “[u]nappropriated for any other purpose *unless the use of such funds is restricted by law or contract to other purposes.*” (Gov. Code, § 970.4, subd. (a), italics added.) The District argues all of its funds come from sources that are restricted by Proposition 218 (Cal. Const., arts. XIII C, XIII D),⁷ namely, sewage fees, water rates, and solid waste collection rates, which cannot be used to pay the judgment because they are property-related fees or charges. (See *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 217 [water delivery charges are charges for a property-related service under Prop. 218]; *Paland v. Brooktrails Township Community Services Dist. Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1361–1362 [basic cost of providing water or sewer service is a charge for a property-related water or sewer service under Prop. 218]; *Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 638, 642 (Roseville) [Prop. 218 applies to in-lieu fee for city’s water, sewer, and refuse collection services].)

Under article XIII D, section 6, a property-related fee cannot be charged in excess of the service provided, it can only be used for the purpose for which it was charged, and it may not be imposed for general governmental services. (*Moore, supra*, 237 Cal.App.4th at p. 368; art. XIII D, § 6, subd. (a)(1), (2) & (5).) The cost to provide services “ ‘includes all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures. The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service. In short, the section 6(b) fee or charge must reasonably

⁷ All article references are to articles of the California Constitution.

represent the cost of providing service.’ ” (*Moore*, at p. 368, quoting *Roseville, supra*, 97 Cal.App.4th at pp. 647–648.) Thus, a public entity collecting sewer service charges from property owners “may appropriately spend these fees on anything related to the maintenance and management of the sewer system.” (*Moore*, at p. 369.) The District argues the judgment from the audit lawsuit does not fall within any of these categories because providing sewer service does not require the payment of money to cover the City’s attorney fees incurred “in obtaining a specific performance [of an] order that it did not want and never enforced.”

Regardless of whether the District’s argument is characterized as a defense or an element of the City’s claim, the issue is whether the award of attorney fees in the audit lawsuit may be characterized as a cost of providing the District’s sewer service. If so, the District’s funds may be used to pay that award without violating Proposition 218. We conclude the award is an operational expenditure that is part of the cost of providing sewer service. The underlying dispute arose out of the City’s contractual right to audit the District’s collection and payment of sewer service fees, and the attorney fees were awarded to enforce that right pursuant to the contract that governs the terms and conditions for transporting and treating the District’s sewage. While the District complains the City never wanted or pursued the audit, our decision in the audit lawsuit shows the City both wanted the audit and pursued it. That the City may have thereafter decided not to conduct the audit does not erase its initial desire for one. The attorney fees the City incurred were due solely to the District’s obstinacy in refusing to submit to an audit, which the Agreement clearly authorized. Since the attorney fee award is a component of the District’s operating costs for providing sewer services to its customers, the District’s revenues from providing sewer, water, and solid waste services may be used to satisfy the judgment without violating Proposition 218.

The District also contends paying the judgment would violate the constitutional provision prohibiting gifts of public funds, as it transfers money generated by the

District's ratepayers to the City and does not serve a public purpose because the City has disavowed any intent to enforce the order for specific performance. (See art. XVI, § 6 [the Legislature is barred from "mak[ing] any gift or authoriz[ing] the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever"]; *Golden Gate Bridge etc. Dist. v. Luehring* (1970) 4 Cal.App.3d 204, 214–215 [diverting portion of revenues from toll payers into the general funds of certain counties violates gift clause, as revenues were raised for a limited purpose]; *Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 495 [settlement of a wholly invalid claim violates gift clause].) We disagree. Since the judgment may be paid from the District's revenues without violating Proposition 218, the payment is not a gift to the City. Even if the City elected not to conduct the audit after securing the judgment that allowed it to do so, the audit lawsuit was based on a valid claim which we upheld when we affirmed the judgment and the attorney fee award.

In sum, the District has both a clear and present duty to pay the judgment and issuing the writ of mandate would not be a futile act.

Authorization to File the Petition for Writ of Mandate

The June 8, 2017 minutes of the city council state the audit lawsuit was discussed with legal counsel in closed session and no open session announcement was made on this item. This lawsuit was filed eight days later. In his opening statement at trial, the City's counsel recognized there was an argument on the City's authority to proceed with the lawsuit and acknowledged a pronouncement was not made following the closed session that such authority had been obtained. The City's counsel stated it was not necessary to make a pronouncement, even though the city council voted in closed session to authorize these proceedings, since the City's charter gives the city attorney authority to pursue collection actions.

The District asserted in its posttrial brief that the City could not maintain this lawsuit because neither the city council nor the Fresno Municipal Code authorized it.

The City responded by pointing out that it was not required to prove it obtained authorization to file suit to obtain a writ of mandate and it was prepared to establish the city council authorized the filing of this action, but the District did not present any evidence to support this defense at trial. The City argued its municipal code authorized the City attorney to pursue collection. The trial court did not address this issue in its statement of decision, despite the District pointing out in its objections to the proposed statement of decision, that the trial court failed to address whether the City authorized this petition.

On appeal, the District argues we must presume the city council did not authorize the filing of this lawsuit because, if the suit had been authorized as a result of the closed session discussion, the City was required to announce that in open session but it did not. The District further argues the Fresno Municipal Code does not grant the city attorney the authority to file this action because a public entity is involved. The District contends that because the city attorney did not have authority to file this lawsuit, either from the city council or the municipal code, the petition is a void act and the resulting judgment is invalid.⁸

The City argues its charter and municipal code granted the city attorney authority to bring this action.

A city that has adopted a charter remains subject to state statutes except regarding “municipal affairs” governed by the charter, which are “ ‘unaffected by general laws on the same subject matters.’ ” (*First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 660.) “Even though the provisions of a city charter displace state

⁸ While the District asserts the trial court’s failure to address this issue in the statement of decision is per se reversible, the District also admits the issue involves a question of law. Since this is a legal issue, we are unconcerned with any purported inadequacy in the statement of decision. (*City of Coachella v. Riverside County Airport Land Use Com.*, *supra*, 210 Cal.App.3d at pp. 1291–1292 [a statement of decision is required only as to issue of fact, not issues of law].)

statutes which would otherwise be applicable to municipal affairs, ‘[t]he provisions of a charter are the law of the State and have the force and effect of legislative enactments.’ [Citation.] As laws of the state, charter provisions are interpreted according to the normal rules of statutory construction. [Citation.] In construing a charter, the objective is to determine legislative intent, and the prime determinant is the plain meaning of the language of the charter. ‘Where the words of the charter are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the charter or from its legislative history.’ ” (*Id.* at p. 662, quoting *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171–172.)

Here, Fresno Municipal Code section 7-910 provides in pertinent part: “Claims of the city against others shall be handled according to the following procedures. [¶] ... [¶] (b) Procedure by City Attorney. [¶] (1) The City Attorney shall pursue collection and may, in furtherance of such collection: [¶] ... [¶] (ii) File an action in the appropriate court to secure a judgment; ...” Under the plain language of this section the city attorney has discretion to handle “[c]laims of the city against others” by filing an action to secure a judgment. The City’s judgment from the audit lawsuit against the District certainly qualifies as a claim against “others” and in bringing this petition for writ of mandate, the city attorney, who told Esqueda a petition for writ of mandate would be filed, was pursuing collection by filing an action to secure a judgment.

The District contends this provision cannot apply to a public entity. While it recognizes the Fresno Municipal Code does not define the word “others,” it argues “others” can only refer to “persons,” which the municipal code defines as a “natural person, joint venture, joint stock company, partnership, association, club, company, corporation, business trust, organization, or the manager, lessee, agent, servant, officer or employee of any of them, and shall include every department of the city and every officer and employee of such department while working in the course and scope of employment.” (Fresno Mun. Code, § 1-204, subd. (g).) The District asserts that because

that definition does not expressly include public entities, public entities such as the District are not “others” within the meaning of municipal code section 7-910. (See *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1179, 1193 [concluding a public school district is not a “person” which can be sued under the California False Claims Act (CFCA) (Gov. Code, § 12650 et seq.) based on CFCA’s language, structure and history, which strongly suggested public entities are not “persons” subject to suit under CFCA].)⁹

Here, we are not dealing with liability under CFCA or on the use of the word “persons.” Rather, we read the word “others” expansively to include persons and entities, including local public entities such as the District.

The District contends the manner of collecting judgments against public entities is a matter of statewide concern and not a municipal matter subject to the City’s ordinances. The District asserts “[i]nterpreting this ‘collection procedure’ to apply to collection of money from a public entity would be to ignore the Legislature’s careful exclusion of a public entity from any method of collection of a monetary judgment except by mandate.”

In some circumstances, state law on matters of statewide concern may justify the application of state law to charter cities. (*State Building & Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547, 564.) But application of this principle involves “actual conflicts between state statutes and city ‘law.’ ” (*People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 601.) There is no conflict between granting the city attorney discretion to pursue a writ of mandate against a local public entity such as the District to collect a judgment and the Government Code statutes governing collection of judgments against a local public entity. Neither

⁹ In so holding, our Supreme Court noted “the statutory list of ‘persons’ contains no words or phrases most commonly used to signify public school districts, or, for that matter, any other public entities or governmental agencies.” (*Wells v. One2One Learning Foundation, supra*, 39 Cal.4th at p. 1190.)

does a grant of discretion to bring a petition for writ of mandate interfere with the uniform application of Government Code section 970 et seq., as in the case the District relies on, *City of Huntington Beach v. Becerra* (2020) 44 Cal.App.5th 243, 275–276.

In sum, the city attorney had the authority to file this action with or without the city council's consent.

Illegality of the Agreement

In response to the petition, the District filed a cross-complaint to rescind the Agreement as illegal or void, in which it sought a declaration that it is released and discharged from any obligations created by the judgments that are the subject of the City's petition. The District incorporated the cross-complaint's allegations into its answer as an affirmative defense. The trial court sustained the City's demurrer to the cross-complaint on the ground a cross-complaint may not be filed to a petition for writ of mandate filed under Government Code sections 970.2 and 970.4.

The District thereafter filed a complaint for rescission of the Agreement in the Fresno County court and filed a motion in the Kings County action to transfer the Fresno lawsuit there. The Kings County court, however, denied the motion, finding it was merely an unauthorized attempt to seek reconsideration of the order sustaining the demurrer. Two months before trial, the District brought a motion to continue the trial date on the ground the Fresno County court had ordered the transfer of the Fresno lawsuit to Kings County, which had not been completed, and the Fresno lawsuit would be dispositive of the City's petition. The Kings County court denied the motion, finding the Fresno lawsuit was a collateral attack on a judgment valid on its face.

At trial, the trial court stated it would not allow the District to elicit any testimony or evidence regarding the Agreement's validity. The District, however, argued in its briefs the Agreement was illegal and its illegality was a principle controverted issue in the case because it gave notice of rescission of the Agreement and offered to restore everything of value it received under the contract when it filed its cross-complaint, which

it incorporated into the answer by reference. The District asserted that while the trial court erroneously disallowed testimony bearing on the Agreement's illegality and the District's unilateral rescission of that agreement, the Agreement's illegality is apparent from its face. The District further asserted the trial court needed to determine the issue of illegality, and if so, whether the District validly rescinded it, as "the illegality of the contract necessarily requires denial of the mandate petition." The District argued that because the illegality of the Agreement was apparent solely from its terms, its rescission claim was not a collateral attack on the second amended judgment but rather showed that judgment was void because it was based on an illegal contract.

In the statement of decision, the trial court found the District may not pursue the claims of illegal contract and void judgment as set out in the cross-complaint, the Fresno lawsuit, and the affirmative defense because they are an unlawful collateral attack on a judgment valid on its face. The trial court explained that if the invalidity of a judgment can be shown only through extrinsic evidence, the judgment is not void on its face and must be challenged within the six-month time limit prescribed by Code of Civil Procedure section 473, subdivision (b), or an independent action in equity. The second amended judgment, however, had been outstanding since 2014 and was not subject to the District's attempt to collaterally attack it.

The trial court noted the District had the option of imposing any increase in sewer fees through the Proposition 218 process, but even if the Agreement violated Proposition 218 due to the requirement that the District charge its customers the same rate for sewage disposal as the City charges its customers, the audit provision, which was the subject of the dispute in the audit lawsuit, is severable from the rates and charges provision under the savings clause in the Agreement. The trial court also found the District's rescission claim was meritless because a rescission action requires the rescinding party to restore the benefits it received. While the City had been processing the District's sewage on a daily basis, the District had not suggested how it could process its own sewage without a

wastewater treatment plant, which would have to be built if the Agreement were rescinded.

The District argues on appeal that it asserted a valid ground for rescission, namely, illegality of the Agreement, and its cross-complaint served as notice of rescission and an offer to restore to the City everything of value the District received under the contract, as provided in Civil Code section 1691. The District asserts its rescission claim is not a collateral attack on the second amended judgment because the District effected a unilateral rescission of the Agreement and the judgment's existence is irrelevant to whether there is a valid ground for rescission. The District further asserts rescission of the Agreement is dispositive of the City's petition "because the remedy for rescission would have put [the District] back in the same position it occupied before the contract was entered into so that there would be no judgment, or because the judgment is a thing of value that [the City] must surrender upon the rescission." The District argues the judgment's elimination does not transform the rescission claim into a collateral attack on the judgment.

While the District claims voiding the judgment is merely a byproduct of its rescission claim, the District's aim is to invalidate the judgment to avoid paying it. This is a collateral attack on the judgment in the audit lawsuit, as it seeks to prevent enforcement of the judgment. (*Estate of Wemyss* (1975) 49 Cal.App.3d 53, 58.) "A collateral attack is made, not in a proceeding brought for the specific purpose of attacking the judgment, but in some other proceeding having a different purpose—it is an attempt to avoid the effect of a judgment or order made in some other proceeding." (*Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 632.) Here, the District is attempting to invalidate the judgment to avoid its effect in the City's proceeding to obtain a writ of mandate to compel the District to pay the judgment. Therefore, its rescission argument based on illegality of the Agreement is a collateral attack on the judgment.

Only “[a] judgment that is void on the face of the record” is subject to collateral attack at any time. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1327 (*OC Interior Services*).) “To prove that the judgment is void, the party challenging the judgment is limited to the judgment roll, i.e., no extrinsic evidence is allowed.” (*Ibid.*) In a case in which a defendant files an answer, the judgment roll consists of: (1) the pleadings; (2) all orders striking out any pleading; (3) the jury verdict, the court’s statement of decision, or the referee’s finding; (4) any order made on demurrer or relating to a change of parties; and (5) the judgment. (Code Civ. Proc., § 670, subd. (b).)

A judgment that is “valid on face of the record” is not generally subject to collateral attack, but rather must be challenged by direct attack, such as a motion or appeal in the original action, an appeal, or independent equitable action, or it may be set aside under Code of Civil Procedure section 473, subdivision (b) within a reasonable time after the party learns of the judgment. (*OC Interior Services, supra*, 7 Cal.App.5th at p. 1328.) On direct attack, extrinsic evidence, i.e., evidence outside the judgment roll, may be presented to rebut the presumption the judgment is valid. (*Ibid.*)

There is an exception to the rule barring collateral attacks to judgments that appear valid on the face of the record: where a party admits facts showing a judgment is void or allows such facts to be established without opposition, a court must treat the judgment as void on its face as a matter of law. (*OC Interior Services, supra*, 7 Cal.App.5th at p. 1328.)

A judgment based on an illegal contract is void where the illegality appears on the face of the judgment roll. (*Signal Oil & Gas Co. v. Ashland Oil & Refining Co.* (1958) 49 Cal.2d 764, 778; *Vasquez v. Vasquez* (1952) 109 Cal.App.2d 280, 283; *Hunter v. Superior Court* (1939) 36 Cal.App.2d 100, 115–116.) The documents from the judgment roll in the audit lawsuit that are part of the record include only the judgments and the

Madera County court's statement of decision. These documents, however, do not show any illegality with respect to the Agreement.

The District contends the exception to rule barring a collateral attack on a judgment that is valid on the face of the record applies because the Agreement is attached to the City's petition as an exhibit which is patently illegal. Determining the validity of the Agreement, however, depends on extrinsic evidence. It appears from the Agreement it was intended to ensure the City received sufficient funds to fund the services it provides the District, namely, its receipt, transport, treatment, and disposal of the sewage from the District's sewage collection system. Without evidence concerning the purpose of the provision concerning the collection and payment of sewer service charges and the use of the City's fee structure, it is impossible to tell whether the Agreement in fact deprived the District of its ability to set its own sewage fees. We note the Agreement permits the District to set fees above the City's and nothing in the Agreement prohibits the District from using the Proposition 218 process to impose any increase in sewer fees. Therefore, the judgment cannot be collaterally attacked by attempting to declare the Agreement illegal.

The District asserts a judgment enforcing an illegal contract is void because the court acts in excess of jurisdiction when it enters such a judgment. But the cases it relies on involve judgments which were invalid on the face of the record or were directly attacked. (*311 South Spring Street Co. v. Department of General Services* (2009) 178 Cal.App.4th 1009, 1012, 1016, 1018 [appeal from postjudgment order denying request to vacate portion of judgment awarding postjudgment interest against the State of California at a rate of 10 percent; award in excess of seven percent interest void and subject to collateral attack at any time]; *Vitatech Intern., Inc. v. Sporn* (2017) 16 Cal.App.5th 796, 800, 807 [appeal from denial of motion to vacate judgment brought in action following entry of judgment; stipulated judgment that includes an unlawful liquidated damages provision is void and may be vacated under Code of Civ. Proc.,

§ 473, subd. (d)]; *Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 606, 609–610 [challenge to legality of arbitrator’s award compensating contractors for work performed on building contract on ground contractors failed to comply with state licensing requirements and therefore were not entitled to enforce their claim; rules giving finality to arbitrator’s award on questions of fact or law inapplicable where the issue of illegality of the entire transaction is raised in a proceeding to enforce the award].) None of these cases involved a collateral attack on a judgment that is valid on the face of the record.

Since the judgments from the audit lawsuit cannot be collaterally attacked on the grounds the Agreement is illegal, they cannot be set aside on that basis. Thus, even if the District has grounds to rescind the Agreement, that rescission would not affect the audit lawsuit judgments, which are final judgments.

Unclean Hands

The District alleged unclean hands as an affirmative defense to the petition in its answer. At trial, the trial court asked the District to provide an offer of proof regarding the unclean hands defense. The District’s counsel began to provide the offer, but then elicited testimony from Rodriguez. Rodriguez testified to 2015 discussions with city officials that led him to believe they did not find the City’s audit attempts were reasonable, no further audit requests would be made, and attempts would be made to reduce or eliminate the judgment against the District. The trial court allowed the District to present evidence and testimony concerning settlement discussions between the District and the City over the City’s objection because the evidence might be relevant to the District’s unclean hands defense. Franklin testified the District made an offer to Esqueda to pay a fourth of the judgment or, alternatively, the District would consider an offer from the City of \$40,000, which Esqueda did not respond to.

In its posttrial brief, the District argued the City’s collection efforts were “tortious” and, as an equitable matter, the trial court should decline to issue the writ of mandate under the unclean hands doctrine. The District asserted the City’s conduct in

demanding the audit, unlawfully recording abstracts of judgment, demanding the District comply with an “illegal term” of the Agreement, and promising to try to resolve what the City acknowledged was the consequence of unnecessary litigation and then failing to consider or respond to the District’s proposals made the District’s performance of the Agreement more expensive and difficult and deprived it of the benefits of the Agreement.

In the statement of decision, the trial court found that while the parties engaged in some preliminary negotiations regarding payment of the judgment, the City and its officials did not act unreasonably and the District was not prejudiced by the city officials’ action or inaction. The trial court sustained the City’s objection to the evidence relating to the settlement discussions and settlement exhibits under Evidence Code section 1152. The trial court further found that even if it considered the District’s offer of proof, it was not persuaded to deny the City the ability to enforce the judgment based on unclean hands, as the evidence did not support the District’s claims. The trial court found Esqueda never received a formal or detailed settlement offer, he was not legally obligated to respond to a settlement offer, the District at all times could have presented a settlement offer to the city attorney, and the city council in closed session declined to accept the \$40,000 settlement offer. The trial court determined there was no legal or ethical basis to preclude the City from filing the petition for writ of mandate to compel payment of the judgment under the unclean hands doctrine.

“The [unclean hands] doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim.” (*Kendall–Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978 (*Kendall–Jackson*)). “Unclean hands applies when it would be inequitable to provide the plaintiff any relief, and provides a complete defense to both legal and equitable causes of action. [Citations.] ‘Whether the defense applies in particular circumstances depends on the analogous case law, the nature of the misconduct, and the relationship of the misconduct

to the claimed injuries.’ ” (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 56.)

While not every wrongful act constitutes unclean hands, the misconduct need not be a crime or an actionable tort. Rather, any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine. (*Kendall–Jackson, supra*, 76 Cal.App.4th at p. 979.) There must be a connection, generally described as a direct relationship, between the complaint and the equitable defense. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 621; *Kendall–Jackson*, at p. 979.) Prior misconduct that only indirectly affects the problem before the court does not suffice. (*Kendall–Jackson*, at p. 979.) Nevertheless, the requirement of a direct relationship between the alleged misconduct and the cause of action is not to be construed in an unreasonably narrow manner. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 681.) Rather, “[t]he question is whether the unclean conduct relates directly ‘to the *transaction* concerning which the complaint is made,’ i.e., to the ‘*subject matter* involved’ [citation], and not whether it is part of the basis upon which liability is being asserted.” (*Ibid.*) The doctrine is applied based on evidence of a plaintiff’s unclean hands that relates to the transaction before the court and affects the equitable relationship between the litigants. (*Kendall–Jackson*, at p. 985.)

“The decision of whether to apply the defense based on the facts is a matter within the trial court’s discretion.” (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 447; see *Aguayo v. Amaro* (2013) 213 Cal.App.4th 1102, 1109 [reviewing trial court’s decision to apply unclean hands defense for abuse of discretion and trial court’s factual findings for substantial evidence].)

The District contends the trial court abused its discretion in refusing to apply the defense because the trial court did not consider all of the evidence bearing on the existence of unclean hands. While the District concedes Esqueda’s failure to relay the

settlement proposal to those with authority to act on it does not by itself amount to sufficient misconduct that would give rise to unclean hands, it asserts the City engaged in “a variety of misconduct” that bears on the defense, including: (1) abusing the court’s process by recording the abstracts of judgment despite knowing this was not an available method of enforcement and obtaining the second amended judgment, which the District asserts is void; (2) seeking to recover the attorney fees “incurred in pursuing unnecessary litigation” despite agreeing not to perform the audit and acknowledging it should never have been attempted, the lawsuit should never have been filed, and the ensuing fee award should not have occurred; and (3) pursuing enforcement of the judgment after being told the Agreement was illegal.

We find no abuse of discretion. The evidence supports the trial court’s findings that Esqueda never received a formal or detailed settlement offer and even if he had, the city council rejected a \$40,000 offer in closed session. Therefore, the parties’ settlement discussions do not provide a basis to apply the unclean hands defense. Contrary to the District’s assertion, it is not misconduct for the City to pursue the legal remedy available to it to enforce the judgment despite being told the Agreement on which it was based is illegal, as the City obviously disagreed with the District’s interpretation of the Agreement and its legality. Taking a legal position is not misconduct.

Even if the City agreed not to perform the audit after obtaining the judgment that allowed it to do so, its continued enforcement of the judgment for attorney fees was not misconduct. In the audit lawsuit, the trial court found City employees properly authorized the audit of the District’s records, the Agreement amply supported the City’s position it should be allowed to access the District’s fiscal records and information pertaining to the Agreement and the District’s compliance with it, and the District breached the Agreement as it was clear the District had the ability to provide the City with records for inspection and allow the City to conduct audits of its fiscal records, yet it repeatedly denied the City the ability to perform the audit. Thus, it was the District’s

intransigence which led to the audit lawsuit and the attorney fees that resulted from it. While the judgment gave the City the ability to conduct the audit, the City was not required to exercise that option in order to recover the attorney fees awarded to it. As a public entity, it is obligated to collect on the judgment, which was validly obtained, otherwise it may be considered a gift of public funds. (Art. XVI, § 6.)

Finally, recording the abstracts of judgment, while unjustified, does not mandate the application of the defense. The City ultimately released the abstracts and there is nothing to show the District was harmed by the recording of them or that they affected the equitable relationship between the parties. While the District complains that the second amended judgment is void because the Madera County court did not have jurisdiction to enter it, the time for challenging that judgment has long since passed. Moreover, the District clearly is liable for the monetary amounts included in the judgment, namely, the costs and attorney fees on appeal, which are shown in the memorandum of costs and order awarding attorney fees on appeal. The City did not abuse the court's process in attempting to obtain a judgment that reflected these amounts. There clearly is no basis on which to find the trial court abused its discretion in deciding not to preclude the City from filing the petition for writ of mandate to compel payment of the judgment under the unclean hands doctrine.

The Award of Attorney Fees

The trial court found the City to be the prevailing party on the writ and ordered the District to pay the City's attorney fees, which it awarded pursuant to Civil Code section 1717, and Code of Civil Procedure sections 1032 and 685.040.

The District contends there is no legal basis for an award of attorney fees. The District argues: (1) the petition for writ of mandate is not an action or proceeding within the meaning of Civil Code section 1717; and (2) while Code of Civil Procedure section 685.040 allows for attorney fees to enforce a judgment, it does not apply to a

petition for writ of mandate brought under Government Code section 970.1, subdivision (b).

Attorney fees are recoverable as costs if authorized by contract, statute, or law. (Code Civ. Proc., § 1033.5, subd. (a)(10).) Determining the legal basis for an award of attorney fees is a question we review de novo. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 751.)

The general authorization for the contractual award of attorney fees is found in Code of Civil Procedure section 1021, which provides: “Except as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys ... is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs....” Under section 1021, the parties to a contract may provide for the award of attorney fees in litigation arising out of the contract as they may agree, including an award for attorney fees incurred in an action based on tort theories (*Lerner v. Ward* (1993) 13 Cal.App.4th 155, 159–161), or under a contractual provision benefiting only one of the parties (*Moallem v. Coldwell Banker Com. Group, Inc.* (1994) 25 Cal.App.4th 1827, 1831–1832). But where an action on a contract that contains a provision providing for an award of attorney fees incurred to enforce that contract, the prevailing party in the action is entitled to an award of attorney fees even if the contract provides for an award of attorney fees only to the other party. (Code Civ. Proc., § 1717.)

Code of Civil Procedure section 1717, however, applies only to “contract actions, where the theory of the case is breach of contract, and where the contract sued upon itself specifically provides for an award of attorney fees incurred to enforce *that* contract.” (*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal.App.4th 1338, 1342.) If the action is not for breach of contract to enforce the contract containing the attorney fee clause, Code of Civil Procedure section 1717 does not apply and the right to an award of attorney fees must be authorized under the more comprehensive provisions of Code of Civil Procedure

section 1021 or by other statute. (*Moallem v. Coldwell Banker Com. Group, Inc.*, *supra*, 25 Cal.App.4th at p. 1830.) Thus, if an attorney fee award is not available under Code of Procedure section 1717, it may be available under section 1021. (*Moallem*, at pp. 1831–1832.)

Even if, as the District contends, the City’s petition for writ of mandate is not an action on a contract within the meaning of Code of Civil Procedure section 1717, the award of attorney fees to the City would be authorized if the Agreement’s attorney fee provision is sufficiently broad to include the remedies the City sought, namely, compelling the District to pay the judgment from the audit lawsuit which was predicated on an award of contractual attorney fees and costs. Traditional rules of contract interpretation apply to determine the scope of an agreement to pay attorney fees. (*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, *supra*, 3 Cal.5th at p. 752; *Patterson v. Superior Court* (2021) 70 Cal.App.5th 473, 480.)

The Agreement’s attorney fees provision states: “If either party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney’s fees and legal expenses.” Here, the City commenced a proceeding by filing a petition for writ of mandate to enforce a covenant or condition of the Agreement, namely, the attorney fees provision under which it was awarded its fees in the audit lawsuit. And as the City points out, this proceeding required the interpretation of several provisions of the Agreement. Thus, attorney fees are authorized by the parties’ Agreement.

The District contends an action to enforce a judgment on a contract with an attorney fees provision cannot result in a fee award, citing *Hambrose Reserve, Ltd. v. Faitz* (1992) 9 Cal.App.4th 129, 132–133. To the extent the District is arguing there is no contractual attorney fee provision on which to award fees in this proceeding because it merged into the judgment, we disagree. A valid final judgment in the plaintiff’s favor

merges the claim into the judgment and extinguishes the cause of action, leaving any right of action on the judgment. (*Gietzen v. Covenant RE Management, Inc.* (2019) 40 Cal.App.5th 331, 337.) Cases such as *Hambrose Reserve* have stated that “[o]nce there is a judgment, contractual rights are merged into and extinguished by the terms of the judgment. At that point there is no subsisting contractual attorney fees provision on which [Code of Civil Procedure] section 1717 may operate.” (*Hambrose Reserve*, at p. 132, citing *Chelios v. Kaye* (1990) 219 Cal.App.3d 75, 80.) Another appellate court, however, explained “the rule would be better stated that the particular cause or causes of action on the contract are merged into the judgment, not the contract itself. Thus, a judgment favorable to plaintiff does not bar a different cause of action brought by plaintiff on the same contract.” (*Gietzen*, at p. 337.)

Here, while the cause of action concerning the City’s right to conduct an audit may have merged into the judgment, the Agreement’s attorney fees provision did not and therefore it was not extinguished. Since that provision encompasses attorney fees in bringing this petition for writ of mandate, the trial court had a proper basis for awarding the City its attorney fees incurred in bringing this petition.

DISPOSITION

The judgments and orders are affirmed. Costs on appeal are awarded to respondent.

DE SANTOS, J.

WE CONCUR:

DETJEN, ACTING P. J.

FRANSON, J.